NO. 94280-3

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:

MATTHEW DOUGLAS SCHLEY,

Petitioner.

SUPPLEMENTAL BRIEF OF THE DEPARTMENT OF CORRECTIONS

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I. INTRODUCTION

The Drug Offender Sentencing Alternative (DOSA) is a grant of leniency authorized by statute and imposed by the court. The judge imposes an alternative sentence equal to just one half of the standard range sentence in exchange for the defendant completing the substance abuse treatment program. If the defendant fails to complete the treatment program, the statute mandates the Department of Corrections to reclassify the sentence. Here, the Department proved by a preponderance of evidence that clinical staff had terminated Schley from the treatment program, and the Department reclassified the sentence. Neither the statute, nor due process required the Department to do anything more.

Schley does not dispute that clinical staff terminated him from treatment after he had been found guilty of a serious prison infraction for fighting with another inmate. Rather, Schley disputes whether he was actually guilty of the infraction. Schley contends that because the infraction was proven at the lower "some evidence" standard of proof, the Department must again prove that he actually fought with this inmate, this time under the higher preponderance of the evidence standard. Essentially, Schley contends that the Department must prove his termination from the treatment program resulted from willful misbehavior. But neither the statute, nor due process requires such proof.

The statute itself does not require proof of willful misbehavior where the offender is terminated from the treatment program. Rather, the statute simply mandates reclassification of the DOSA sentence if the offender fails to complete or is administratively terminated from the treatment program. Nor does the Due Process Clause require proof of willful misbehavior. The very purpose of the DOSA alternative sentence is to provide substance abuse treatment. The offender's termination from the treatment program defeats that purpose. The Due Process Clause does not allow an offender to continue reaping the benefit of the alternative sentence (a much shorter prison term) when the purpose of the sentence is no longer served. Although Schley disputes whether he actually fought with another inmate, due process requires only proof that Schley had been terminated from the substance abuse treatment program, not proof that the termination resulted from his willful misbehavior.

The Department also did not violate the limited right to request counsel in the reclassification hearing. The hearing was not complex since the issue to be decided was limited to whether or not Schley had been terminated from the treatment program. And Schley demonstrated he was capable of adequately representing himself in that hearing on that issue. Schley therefore was not entitled to counsel at the hearing.

II. ARGUMENT

A. The Department Must Reclassify a DOSA Sentence Where the Offender Fails to Complete or is Administratively Terminated from the Treatment Program

The Sentencing Reform Act abolished the superior court's general authority to suspend sentences for felony offenses. *See* RCW 9.94A.575. In place of this authority, the Legislature enacted sentencing alternatives that allow the court to grant leniency by imposing a reduced term of confinement in lieu of a lengthy prison sentence. *See* RCW 9.94A.655 (parenting alternative); RCW 9.94A.660-664 (drug offender alternative); RCW 9.94A.670 (sex offender alternative). But this grant of leniency requires the defendant to comply with the conditions of the sentence.

An integral condition of each sentencing alternative is successful participation in treatment. For example, the parenting alternative sentence statute authorizes the Department to require the offender to participate in parenting and life skills education, as well as receive mental health and chemical dependency treatment. RCW 9.94A.655(5)(b). Similarly, the Special Sex Offender Alternative (SSOSA) statute requires the offender to participate in extensive sex offender treatment. RCW 9.94A.670(5)(c). And the DOSA statutes expressly make substance abuse treatment a critical part of both the prison-based and residential-based DOSA alternative sentences. RCW 9.94A.662(2); RCW 9.94A.664(1).

The DOSA sentence is a "treatment-oriented alternative" sentence imposed for the very purpose of providing treatment to drug offenders. *See State v. Grayson*, 154 Wn.2d 333, 343, 111 P.3d 1183 (2005); *State v. Hender*, 180 Wn. App. 895, 900, 324 P.3d 780 (2014); *State v. Waldenberg*, 174 Wn. App. 163, 166 n. 2, 301 P.3d 41 (2013); *State v. Bramme*, 115 Wn. App. 844, 852, 64 P.3d 60 (2003); *State v. Kane*, 101 Wn. App. 607, 609, 5 P.3d 741 (2000). Under the prison-based DOSA statute, the offender serves only half of the standard range sentence in prison. RCW 9.94A.662(1)(a); *Grayson*, 154 Wn.2d at 337-38. In exchange for this lenient sentence, the offender must successfully participate in treatment while incarcerated. *Grayson*, 154 Wn.2d at 337-38. If the offender fails to complete the treatment program, the offender must serve the full standard range sentence in prison. *Id*.

The DOSA statute expressly provides, "An offender who fails to complete the program or who is administratively terminated from the program shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing court." RCW 9.94A.662(3). Under the statute, the only material issue in a reclassification hearing is whether or not the offender was terminated from the treatment program. At least where no improper motive is alleged, and none is alleged here, the reason why the offender was terminated from treatment does not matter.

Here, clinical staff terminated Schley from the treatment program. Appendix H, Chemical Dependency Clinical Staffing.[1] At the subsequent reclassification hearing, the hearing officer concluded that a preponderance of evidence proved that Schley had been terminated from the treatment program. Appendix K, DOSA 762 Infraction Hearing Report, at 2-3 and 5; Appendix L, Transcript of Hearing, at 32-35; Appendix M, Hearing and Decision Summary Report. The hearing officer specifically noted that she was not considering whether Schley was guilty of the underlying misbehavior that led clinical staff to decide to terminate treatment. Appendix K, at 4; Appendix L, Transcript of Hearing, at 18-20. Instead, she was considering only whether Schley had been terminated from treatment Appendix L, at 20-21. The hearing officer determined by a preponderance of the evidence that staff had terminated Schley from the treatment program, and the hearing officer concluded that the termination required reclassification of the DOSA sentence. Appendices K, L, and M.

The hearing officer's decision complies with the requirements of RCW 9.94A.662(3). The decision also complies with the minimal process due to Schley in the reclassification hearing. The Department did not violate due process in reclassifying the DOSA sentence after determining that Schley had been terminated from the treatment program.

[1] The appendices were submitted with the motion for discretionary review.

B. Due Process does not Require Proof of Other Facts, Such as the Offender's Underlying Misbehavior, Prior to Reclassification of the DOSA Sentence

Schley does not dispute that he was terminated from treatment. Rather, Schley contends that before the Department may reclassify his sentence for his termination from treatment, the Department must first prove by a preponderance of the evidence the reason for his termination. Schley essentially contends that the Department must prove his termination from treatment resulted from his willful misbehavior of fighting with another inmate. But as this Court has held with SSOSA sentences, due process does not require proof that the failure to complete treatment was due to the offender's willful misbehavior.

The hearing to reclassify an alternative sentence is not a part of the criminal proceedings, and the due process rights afforded at the hearing are not the same as those provided to a defendant in the criminal trial. *See State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999) (citing *State ex rel. Woodhouse v. Dore*, 69 W.2d 64, 416 P.2d 670 (1966); *In re Boone*, 103 Wn.2d 224, 230, 691 P.2d 964 (1984)). The offender has already been convicted and sentenced, and as a result the offender is entitled to only minimal due process at the reclassification hearing. *Dahl*, 139 Wn.2d at 683 (citing *State v. Nelson*, 103 Wn.2d 760, 763, 697 P.2d 579 (1985)); *State v. McCormick*, 166 Wn.2d 689, 702, 213 P.3d 32 (2009).

Minimal process due requires only proof that the offender was terminated from treatment; not proof of other facts, such as willful misbehavior. *See McCormick*, 166 Wn.2d at 705. This Court's jurisprudence on SSOSA sentences supports this conclusion. Like a DOSA sentence, a SSOSA sentence is also an act of leniency conditioned on the offender's successful participation in treatment. *McCormick*, 166 Wn.2d at 702; *Compare* RCW 9.94A.660(2) *with* RCW 9.94A.670(5)(c). Both statutes mandate treatment, and both sentences are to be reclassified if the offender fails to successfully complete the required treatment. *Compare* RCW 9.94A.660(3) *with* RCW 9.94A.670(11).

The Court has recognized that a SSOSA sentence may be reclassified based upon proof that the offender failed to comply with treatment, regardless of whether the failure resulted from willful behavior. *McCormick*, 166 Wn.2d at 705. "SSOSA may be revoked at any time if a court is reasonably satisfied that an offender has violated a condition of his suspended sentence or failed to make satisfactory progress in treatment." *Dahl*, 139 Wn.2d at 683 (citing *State v. Badger*, 64 Wn. App. 904, 908-09, 827 P.2d 318 (1992)); *see also McCormick*, 166 Wn.2d at 705.

In *McCormick*, the court revoked the SSOSA sentence after McCormick had been terminated from treatment for loitering near a church school. *McCormick*, 166 Wn.2d at 694-96. McCormick contended

that the judge had to find willful misbehavior in order to revoke the sentence. Rejecting this argument, the Court concluded that neither the SSOSA statute, nor due process required proof of a willful violation before the judge revoked the sentence. *McCormick,* 166 Wn.2d 698-705. Due process requires a showing of willfulness only where the violation is based upon the offender's financial status, such as the failure to pay a fine or fee. *Id*. at 700-01 (citing *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L.Ed.2d 221 (1983) (due process prohibits the court from punishing the offender for being indigent)). A showing of willfulness is not required in other contexts. *McCormick,* 166 Wn.2d at 701.

This Court noted that while the *Bearden* Court dealt with a situation where proof of willfulness was necessary, the Supreme Court had also provided an example of where willful misbehavior was unnecessary, and in fact would be counterproductive. *McCormick,* 166 Wn.2d at 701 (quoting *Bearden*, 461 U.S. at 668 n. 9). It recognizing the limits of its holding, the Supreme Court had explained, "'For instance, it may indeed be reckless for a court to permit a person convicted of driving while intoxicated to remain on probation once it becomes evident that efforts at controlling his chronic drunken driving have failed.'" *McCormick*, 166 Wn.2d at 701 (quoting *Bearden*, 461 U.S. at 688 n. 9). This example is analogous to a DOSA sentence.

An evaluation of the factors this Court considered to determine that proof of willfulness was unnecessary to reclassify SSOSA sentences demonstrates that proof of willful misbehavior is equally unnecessary to reclassify DOSA sentences. *See McCormick*, 166 Wn.2d at 701-02. These factors include "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between the legislative means and purposes, and the existence of alternative means for effectuating the purpose." *Id*. The offender's interest in a showing of willfulness "comes from the idea that a person is punished only for the acts within his or her control." *Id*. at 702. But that interest is diminished significantly because the offender was convicted and granted a lenient sentence by the grace of the court. *Id*.

Conversely, the State's interest in protecting society from repeat offenses is rationally served by imposing stringent conditions, such as the requirement to participate in treatment. *McCormick*, 166 Wn.2d at 702; *State v. Miller*, 180 Wn. App. 413, 423, 325 P.3d 230 (2014). Given the strength of the State's interest in treatment and the diminished interests of the offender, "the balance tips heavily in favor of not requiring a finding of willfulness" when the court is considering reclassification of an alternative sentence. *McCormick*, 166 Wn.2d at 703.

Washington courts have consistently revoked SSOSA sentences based upon the offender's failure to satisfactorily complete treatment, without the need of proof that the failure was due to willful misbehavior. *See, e.g.*, *State v. Morrison*, 70 Wn. App. 593, 594-95, 855 P.2d 696 (1993); *State v. Kistner*, 105 Wn. App. 967, 970, 21 P.3d 719 (2001). Courts in other jurisdictions have upheld similar revocations without proof that the failure to complete treatment was caused by willful misbehavior.

For example, in *State v. Williams*, 296 Mont. 258, 260-66, 993 P.2d 1 (1999), the trial court suspended the sentence on the condition that Williams complete a treatment program. The trial court later revoked the suspended sentence after the treatment provider refused to accept Williams into the program. *Id.* at 261. Williams challenged the revocation, contending his rejection from the treatment program was not caused by his own wrongdoing. *Id*. at 262. The Montana Supreme Court rejected this argument, concluding the trial court need not find the failure to complete treatment was due to Williams's willful misconduct. *Id.* at 263-64. Rather, the Montana Supreme Court found the revocation was proper because the failure to obtain treatment frustrated the very purpose of probation, namely the rehabilitation of the offender. *Id.* at 265.

In *State ex rel. Nixon v. Campbell*, 906 S.W.2d 369 (Mo. 1995), the Missouri Supreme Court affirmed the revocation of probation because,

although due to no fault of the defendant, the ordered treatment program had been cancelled by the State. *Campbell*, 906 S.W.2d. at 370-71. The court recognized that other "states have agreed that fault of the defendant in not meeting the probation conditions may not be a necessary factor in deciding whether to revoke probation." *Id.* at 372.

In *People v. Davis*, 123 Ill. App.3d 349, 352, 462 N.E.2d 824 (1984), the court held that a defendant's failure to secure treatment justified revocation of probation, even though the defendant himself "engaged in no culpable or willful misconduct during his final term of probation." The Illinois court recognized that in many situations, "[w]hen the varied purposes of probation are fully considered, it becomes readily apparent that nonculpable conduct on the part of a probationer may frustrate the goals of a probationary sentence." *Id*. at 353.

The same rule should apply equally to offenders who fail to complete treatment in DOSA sentences. The failure to complete the DOSA treatment program frustrates the very purpose of the DOSA sentence, and requires reclassification regardless of why the offender failed to complete treatment. The Department correctly reclassified the DOSA sentence because Schley had been terminated from treatment. The Department was not required to also prove by a preponderance of the evidence that the termination resulted from Schley's willful misbehavior.

C. The Due Process Clause did not Provide Schley the Right to Contest in the DOSA Reclassification Hearing the Issue of Whether he Actually Fought with Another Inmate

Schley contends that the reclassification of his sentence violated due process because the fact that he fought with another inmate had only been proven using the lower "some evidence" standard of proof. But as argued above, the Department need not prove the termination from treatment resulted from Schley's willful misbehavior. The Department need not prove in the reclassification hearing that Schley actually fought with the other inmate. The Department must prove only that clinical staff had terminated Schley from the treatment program. Having proved that fact, the Department properly reclassified the DOSA sentence.

But even if the existence of the prior prison infraction was at issue in the DOSA reclassification hearing, Schley had no right to again challenge whether he actually fought with the other inmate. The only issue in the reclassification hearing would be whether Schley had received the infraction, not whether Schley was guilty of the prior infraction.

There is no due process right to challenge the validity of a prior prison infraction used in subsequent hearings. *In re Gronquist,* 138 Wn.2d 388, 978 P.2d 1083 (1999). That the prior infraction was imposed under a lower level of due process, or as in *Gronquist* with no due process, does not give the offender a right to challenge the infraction in a later hearing.

Gronquist, 138 Wn.2d at 399-406. Even in criminal cases, a defendant has no right to collaterally challenge the validity of a prior conviction used in a subsequent proceeding. *Gronquist*, 138 Wn.2d at 402-04 (citing *Custis v. United States*, 511 U.S. 485, 493-97, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994); *Nichols v. United States*, 511 U.S. 738, 748-49, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994)). "It is well settled that the State is not required to prove the constitutional validity of prior convictions used to calculate a defendant's offender score on a current conviction." *State v. Irish*, 173 Wn.2d 787, 789, 272 P.3d 207 (2012) (citing *State v. Ammons*, 105 Wn.2d 175, 187-88, 713 P.2d 719 (1986)) (requiring the State to prove the validity of the prior conviction would turn the current proceeding into an appellate review of the prior convictions).

Here, it is undisputed that Schley was found guilty of a serious prison infraction for fighting with another inmate. Although Schley denies fighting, he cannot contest that he was found guilty at the infraction hearing. Even if the existence of the prior prison infraction was an issue in the DOSA reclassification hearing, the issue would be whether the prior prison infraction existed, not whether the infraction was valid. Schley did not have the right to again litigate his guilt or innocence of the prior prison infraction in the later hearing. Even in criminal cases, due process does not provide such a right.

Several crimes contain a predicate element, the existence of which is proven without having to reprove the facts underlying the predicate itself. For example, unlawful possession of a firearm exists if the defendant possesses the firearm after being convicted of a felony, but the prosecution does not have to again prove the defendant actually committed the prior felony in the subsequent firearm trial. *Lewis v. United States*, 445 U.S. 55, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980). Similarly, first degree escape exists if the defendant escapes while in custody under a prior felony conviction, but the prosecution need not prove again in the escape trial that the defendant actually committed the acts underlying the prior felony conviction. *State v. Hall*, 104 Wn.2d 486, 706 P.2d 1074 (1985). And a defendant convicted of driving while licensed revoked cannot challenge in the criminal proceedings the prior administrative decision to revoke the license. *State v. Storhoff*, 133 Wn.2d 523, 946 P.2d 783 (1997).

Here, the hearing officer relied on the evidence that clinical staff had terminated Schley from the treatment program. Appendix K (DOSA 762 Infraction Hearing Report); Appendix H (Chemical Dependency Clinical Staffing). The clinical staff had terminated Schley after he violated the conditions of the DOSA agreement by receiving a prison infraction. Appendix H. The hearing officer found this evidence proved that Schley had been terminated from the treatment program. Appendix K.

Even assuming that the reasons why clinical staff terminated Schley were an issue at the reclassification hearing, the Department complied with due process by proving by a preponderance of the evidence that clinical staff terminated Schley because he had received a prison infraction in violation of the DOSA conditions. Due process did not require the Department to prove in the reclassification hearing that Schley actually fought with the other inmate. Having proven that clinical staff terminated Schley from the treatment program because he had received the prison infraction, the Department complied with due process.

D. Schley was not Entitled to Counsel in Light of the Limited Issue to be Decided at the DOSA Reclassification Hearing

There is no automatic right to the appointment of counsel in reclassification hearings. Due process provides only a limited right to request the appointment of counsel in such hearings. *Gagnon v. Scarpelli*, 411 U.S. 778, 790, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); *Grisby v. Herzog*, 190 Wn. App. 786, 362 P.3d 763 (2015). Due process does not provide a right to counsel if the case is not complex and the offender appears capable of speaking effectively for himself. *Gagnon*, 411 U.S. at 790-91. The appointment of counsel will likely be undesirable and constitutionally unnecessary in most hearings. *Id.* at 790.

Here, the issues in the hearing were not complex as the hearing concerned whether Schley had been terminated from treatment. Even if the hearing involved the issue of why clinical staff had terminated Schley from treatment, the issues still were not complex. The hearing involved a straightforward factual issue and did not present a complex case. *In re Price*, 157 Wn. App. 889, 906, 240 P.3d 188 (2010). Given that Schley demonstrated an adequate ability to represent himself, the lack of counsel did not violate the limited right to request counsel.

III. CONCLUSION

The Department reclassified Schley's DOSA sentence after finding by a preponderance of the evidence that Schley had been administratively terminated from the DOSA treatment program. The Department's actions complied with the statute and due process. For that reason, the Court should reverse the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED this 31st day of October, 2017.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the SUPPLEMENTAL BRIEF OF THE DEPARTMENT OF CORRECTIONS with the Clerk of the Court using the electronic filing system and which will send notification of such filing to the following party:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 31st day of October, 2017, at Olympia, WA.

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